No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES, PETITIONER,

vs.

BLOEDEL-DONOVAN LUMBER MILLS, a corporation,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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INDEX

TABLE OF CASES

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STATEMENT OF THE CASE

In 1940 respondent, Bloedel Donovan Lumber Mills, a corporation, entered into two written contracts with the petitioner, the United States, whereby the respondent agreed to cut and remove from two certain parcels of land owned by petitioner, located in the Olympic National Forest in the western part of the State of Washington, certain standing timber and to pay petitioner therefore at the rates specified in the contracts. The contracts further provided (paragraph 16, Exhibits Transcript page 8, that the respondent "agrees to burn such of the slash resulting from this sale as the forest supervisor may require at such times and in such manner as the forest officer in charge shall specify * * *."

On September 10, 1942, in the late afternoon, the superintendent of the respondent at Sappho, Washing-

ton, received a peremptory demand from the duly authorized officers of the government to set fire to and burn the slash resulting from said contract beginning the following morning at eight a.m. The superintendent objected, upon the ground that such an operation under the conditions then prevailing was highly dangerous. The officers of the government insisted. An argument ensued. Ultimately the superintendent yielded and on the following morning a crew of men was placed at the disposal of the government officers who proceeded to set the slash fire. The superintendent's fears appeared to have been only too well grounded, the fire got out of control, and inflicted substantial damage upon respondent.

Respondent thereupon brought suit against petitioner in the Court of Claims alleging in substance, briefly, that it had entered into said contracts with petitioner, that it was an implied condition of said contract that the authority vested in petitioner to determine whether said slash should be burned and if so, the time and manner thereof would be exercised with due care and skill. That the officers of the petitioner failed to exercise due care and skill in determining the time and manner of said burning of said slash and that the damage sustained by respondent was a direct result of their failure so to do.

Trial before the Court of Claims resulted in findings and judgment of that court sustaining the allegations of respondent's petition and awarding judgment in the favor of respondent in the sum of $70,798.46. The evidence before the Court of Claims has not been

brought up and no claim is made here that the findings are contrary to the evidence or that they are not supported by substantial evidence.

Petitioner in this court now asks Certiorari. It states the questions which it desires to present as follows:

> "1. Whether, under the standard slash disposal provisions of a government timber sales agreement, the United States contracts to reimburse a contractor for damages caused him by the negligence of the government officers in directing the setting of slash fires.
>
> "2. Whether, assuming that the United States has so contracted, the instant claim is, nevertheless, one 'sounding in tort' over which the Court of Claims lacks jurisdiction.[1]

> "[1]A subsidiary question presented is whether in the circumstances, as found below, the damages to respondent's property on September 21, 1942, located on land four miles beyond the area covered by the burning plan, was a foreseeable result of the negligence of the government officers in directing that the slash fires be set on September 11, 1942." (Petition, page 2)

It bases its claim to review by Certiorari upon the ground that (page 13 of Petition) "The questions raised by the present case are of general importance meriting review by this court."

We address ourselves first to this question of

GENERAL INFORMATION

There is nothing in the record of the case itself to indicate any general importance to be attached to the

issues presented. The issues presented before the Court of Claims were largely factual. Their occurrence again in the same form seems improbable.

The claim of general importance of the questions presented appears to be predicated entirely upon certain statements contained in a letter from the Honorable James A. Doyle, Associate Solicitor of the Department of Agriculture to the Solicitor General, a copy of which letter is attached to the petition on page 23 as Appendix A. This letter is certainly, legally at least, a mere unsworn self-servicing declaration as to the accuracy of which, respondent manifestly has no means of getting any detailed information. Respondent implies no criticism direct or indirect of the author of the letter.

As respondent analyzes this letter, it furnishes no basis whatsoever for any claim that the questions presented by this case are of such general importance as to justify issuance of a Writ of Certiorari. If the letter is examined, it will be observed that it is not stated in the letter that there is pending at the present time either in any court or in the department itself, any claim whatsoever, the decision of which would in any manner be affected by the decision rendered by the Court of Claims in this case. In fact, the letter expressly states to the contrary saying that prior to the date thereof, May 21, 1948, "No claim has been made or suit brought against the United States for damages resulting from the spread of slash fires which were set in compliance with the provisions of the contract." Nor does the letter claim that the department has any

knowledge of any specific facts or any specific situation or situations which would seem to indicate a threat of any such claim or suit or the possibility, let alone the probability, that any suits of a similar character may be brought in the future. It is stated in the letter that there are numerous other contracts containing "A clause *substantially* similar to that here involved." Presumably the clauses in these contracts as to wording vary. Whether the variation is of any moment cannot be determined from the letter.

In the petition and in the letter, it is stated that during the last forty years other slash fires set under the supervision of the government officers have gotten out of control and caused extensive damage and that the government had not reimbursed the contractor for such damage in any case. As to how many such occurrences there have been in the forty-year period, there is no statement — not even a general statement that they have been numerous. There is of course no statement either in the letter or the petition that any of these fires have been caused by the negligence or misconduct of the employees of the department nor is there any statement that any claim has been made in any case except the instant one that the fires were so caused.

The principal ground upon which a review is sought appears to be the claim of the petitioner that the claim of respondent sounds in tort and that the government was therefore immune from suit thereon. It would seem that as to claims originating after Jan. 1, 1945 (the effective date of the Federal Tort Claims Act)

this defense, if available at all to petitioner (which we do not believe it is) would be no longer available so that the scope of this decision as affecting the Department of Agriculture would appear to be limited to claims, if any, arising prior to January 1, 1945, and which possessed a sufficient similarity upon the facts to make the rule in the case now before the court apply. Such claims must have come into existence prior to January 1, 1945. If there were such, it seems probable at least that they should by this time have come to light. That there exist any such claims is not even suggested. The suggestion that the issues presented by this case present any real question of public importance is, we submit, a pure figment of the imagination.

ARGUMENT

The petition is not accompanied by a separate brief nor is their contained in the petition any division of it which is formally designated as "Brief." The petition does contain, beginning on page 16, some arguments and the citation of some cases which respondent assumes were intended by petitioner as a brief. The argument takes quite a wide range and argues quite a number of different matters, which respondent will endeavor to discuss herein.

If respondent catches petitioner's position correctly and respondent is frankly not certain that it does, the principal question that petitioner desires to raise is that the claim of respondent rests in tort and is not within the jurisdiction of the Court of Claims. This

question the lower court disposed of in its decision (Transcript 40) as follows:

> "The contracts expressly provided that plaintiff burn slash 'at such times and in such manner' as the forest officer in charge should specify. This implied an obligation on the part of defendant to use due care in specifying a time when the slash must be burned. If defendant's forest officer failed to exercise due care in specifying a time to burn, and if, as a result, the burning damaged plaintiff's property, defendant would be liable for such damage as might reasonably have been foreseen as the natural probable consequence of his action. This action being connected with and growing out of a contract is within the jurisdiction of this court. *Dooley v. United States*, 182 U.S. 222, 228; *United States v. Spearin*, 248 U.S. 132; *Moore v. United States*, 46C. Cls. 139, 173; *Chippewa Indians v. United States*, 91C. Cls. 97, 130, 131; *Deterding v. United States*, 107 C. Cls. 656, 661; *Heil v. United States*, 273 Fed. 729, 731."

It is submitted that the cases cited above amply sustain the position of the court. To the same general effect, in addition are in this court, *United States v. Bostick*, 94 U.S. 53, and more recently *Keifer and Keifer v. R.F.C.*, 306 U.S. 381, 391. The rule was enunciated in the Court of Claims as early as *Moore v. United States*, 46 Court of Claims 139, where the court said (page 172):

> "What is the responsibility of the Government where its engineer in charge actively directs work to be done in a certain manner which proves defective and causes great loss to the contractor

> and where the exercise of ordinary care could have foreseen such defects?"

After a detailed discussion of the matter, the court concluded (page 174):

> "We believe the rule in cases of this character to be that where a contractor constructs a work under a contract which provides that it shall be done under the direction and supervision of an engineer appointed by and under the employ of the owner [Government] and loss occurs to such contractor by reason of the defects in the plans directed to be followed by such engineer of a character which ordinary skill would have foreseen, the owner [Government] should pay for such loss."

Petitioner cites in support of its position: *Schillinger v. United States*, 155 U.S. 163; *Bigby v. United States*, 188 U.S. 400; *Tempel v. United States*, 248 U.S. 121; *Pearson v. United States*, 267 U.S. 423, but in none of these cases, as the court in each of them specifically pointed out, was there any contractural relationship with the United States. In the instant case the liability arises out of the acts of petitioner pursuant to its contract. It was the existence of the contract which made it possible for petitioner's officers to perform those acts. Had there been no contract, respondent would have sustained no loss.

The petitioner comments at some length upon the proposition that two members of the court dissented. We have no disposition at this point to argue the merits of the dissenting opinions, but in connection therewith it should be noted that neither of the judges

expressed any doubt as to the court's jurisdiction. Their dissent was limited to two propositions and to two propositions only. First, the dissenting opinion seems to hold that the petitioner and the respondent were engaged in a "joint-venture." It is most respectfully submitted that there is not the slightest element of "joint-venture" in the relationship existing between the parties. If this contract was a joint-venture, then very contract by the terms which A agrees to build a house for B and B agrees to pay for it, is a joint-venture. Certainly the parties are both interested in the result, but that, by no means, constitutes the same, a joint-venture.

The second ground of the dissent is "that the damages sustained were "not the foreseeable result" of the action of the government's officers." This is purely a question of fact, a question which was resolved against the petitioner by the decision of the majority. The correctness of the decision of the majority upon both of these issues is not challenged by the petitioner here.

Some contention appears to be made that the officers of the United States acted in excess of their authority, but this would appear to present a question of fact, or at best, a mixed question of fact and law which has been resolved against the petitioner by the decision of the court below upon the facts.

Lest the matter be not completely understood, let us briefly call attention to the physical situation presented out of which this claim of the petitioner arises. The two tracts covered by the two separate contracts

with petitioner were not contiguous. Between them lay other slash. It was an inevitable physical result that if any of this slash was set on fire, all of it would burn. The officers of the petitioner in preparing plans for burning the slash, naturally and properly took this fact into account. Their plans covered the contingency that all of the slash would burn which was true not as a matter of law, but as a matter of inevitable physical fact. Petitioner argues that the only authority the officers of the United States had was in respect to the burning of the slash upon the ground covered by the contracts. It seems almost self-evident that the grant to the United States of the power to require the slash upon the land covered by the contracts to be burned by necessary implication carries a grant of a right to burn slash on adjacent property if that was indespensible or reasonably necessary to the proper burning of the slash on the property covered by the contracts. To construe the contract as petitioner now attempts to do, as limiting the right of the petitioner to have the slash burned to the setting of a fire or fires which would only burn the slash on the property actually covered by the contract would be to construe the right to have the slash burned completely out of the contract because as a physical proposition such a construction could not be performed. There is no finding and there was in fact, no evidence that it was practicable, to attempt to burn only the slash located on the ground covered by the government's contract, or that if such an attempt had been made it would have changed the result in any degree. The claim of petitioner that the officers were acting be-

yond the scope of their authority was tenuous at best. It was resolved against them on the facts by the lower court.

The lower court held on voluminous evidence that the officers of the petitioner were guilty of serious misconduct in actions performed within the scope of their authority and that respondent's loss was the direct result thereof. The evidence upon that decision is not brought to this court and the correctness of the decision of the lower court upon those questions are neither challenged here nor is it open to challenge here, nor is it within the scope of the questions which the court is by the petition requesting to review.

In conclusion, the respondent desires to call attention to the fact that in no place in the record is it claimed that the result arrived at was unfair or unjust or that the petitioner by the decision of the court will be compelled to pay a claim which it does not justly and fairly owe. The damage to respondent was real, its extent and amount was not disputed by petitioner. It is most respectfully submitted that the application for the writ should be denied.

Respectfully submitted,

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